Supreme Court, U.S.
FILED
AUG 6 1999
OFFICE OF THE CLERK

No. 99-113

IN THE
Supreme Court of the United States

VILLAGE OF NORTHFIELD,

Petitioner,

v.

10280 NORTHFIELD ROAD, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

GREGORY FISHER LORD
Counsel of Record
GREGORY FISHER LORD, P.C.
Attorneys for Respondent
12900 Hall Road
Suite 470
Sterling Heights, MI 48313-1152
(810) 997-4900

154371

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether this Court should deny review of the decision of the Sixth Circuit Court of Appeals holding: (A) that the unconstitutional aspects of a municipal ordinance were not severable from the remaining sections of that ordinance which had been held to be an unconstitutional system of prior restraint; (B) that the District Court was without authority to rewrite the ordinance to achieve constitutionality; and (C) that the remaining sections of the ordinance, even as rewritten by the District Court, still comprised an unconstitutional prior restraint system?

STATEMENT PURSUANT TO RULE 29.6

Respondent, 10280 Northfield Road, LLC, has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions and Orders Below	1
Constitutional Provisions Involved	1
Statement of the Case	2
A. The Challenged Ordinance	2
B. District Court Proceedings	3
C. Court of Appeals Proceedings	5
Reasons for Denying the Writ	7
I. The Sixth Circuit Correctly Stated And Applied Established Principles Of Law In Holding That The Constitutional Provisions Of The Ordinance Could Not Be Severed From Its Unconstitutional Provisions.	8

Contents

Page

II. The Sixth Circuit Holding That The District Court Lacked Power To Redraft The Ordinance Does Not Merit Review. 11

III. The Sixth Circuit Holding That The Ordinance, Even As Judicially Redrafted, Would Remain An Unconstitutional System Of Prior Restraint Has Not Been Challenged By Petitioner, And Renders The Petition Meritless. 14

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Blount v. Rizzi, 400 U.S. 410 (1971) 13

Eubanks v. Wilkinson, 937 F2d 1118 (6th Cir. 1991) . 12

Freedman v. Maryland, 380 U.S. 51 (1965) 13, 15

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 13, 15

Hill v. Wallace, 259 U.S. 44 (1922) 13

Leavitt v. Jane L., 518 U.S. 137 (1996) 8

State v. Kassay, 126 O.S. 177; 184 N.E. 521 (1932) 10

State v. Pugh, 43 O.S. 98; 1 N.E. 439 (1885) 10

Thornburg v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 10

Triplett Grille, Inc. v. City of Akron, 40 F3d 129 (6th Cir. 1994) 12

United States v. Reese, 92 U.S. 214 (1875) 13

United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) 13

Cited Authorities

Page

Statute:

42 U.S.C. § 1983 3

United States Constitution:

First Amendment 1, 3

Fourteenth Amendment 1, 3

Rules:

United States Supreme Court Rule 10 7

United States Supreme Court Rule 14, 1(a) 15

Other Authorities:

Northfield Codified Ordinance Section 202.07(a)(2) 9

Northfield Codified Ordinance Chapter 802 .....
..... 2, 3, 5, 9, 10, 11

Northfield Codified Ordinance Section 802.02 ... 2

Northfield Codified Ordinance Section 802.03 ...
..... 2, 3, 9, 10, 11, 12, 16

Northfield Codified Ordinance Section 802.04 ..3, 9, 10

Cited Authorities

Page

Northfield Codified Ordinance Section 802.05 . . . . . 2, 9, 10, 11

Northfield Codified Ordinance Section 802.99 . . . 2

Northfield Codified Ordinance Section 1220.05 . . 15

TABLE OF APPENDICES

Page

Appendix A — Judgment Entry Of The United States District Court For The Northern District Of Ohio, Eastern Division Dated And Filed September 26, 1997 ..... 1a

OPINIONS AND ORDERS BELOW

In addition to the Opinions and Judgments reprinted in Petitioners Appendix, Respondent has included, at pp. 1a-2a of Respondent's Appendix, the September 26, 1997 Judgment of the District Court.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States of America

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the Freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

A. The Challenged Ordinance

On May 22, 1996, the Village of Northfield enacted Chapter 802 of the Northfield Codified Ordinances. Chapter 802, together with Petitioner's version of the judicial amendment effected by the District Court, is reprinted at pp. 2-9 of the Petition for Writ of Certiorari.[1]

In general, Chapter 802 defined an "adult bookstore," designating that enterprise as a "sexually oriented business" (Section 802.02), and, under threat of criminal sanction (Section 802.99), mandated that such an enterprise receive a "conditional use permit" prior to being allowed to open within the Village. (Section 802.03).

Power to grant/deny an application for a "conditional use permit" was conferred upon the Village Council which was authorized to act only after receipt of a recommendation from the Village Planning Commission. (Section 802.05).[2]

---

1. The District Court rewrote Section 802.03 of the Ordinance with Petitioner's version of the words added by the District Court appearing in italics at p. 6 of the Petition. From Respondent's perspective, rooted in the District Court's Memorandum Opinion itself, the actual provision added by the District Court reads somewhat differently and is set forth at p. 4, *infra*.

2. The village council is the legislative arm of Northfield and has 6 elected members. The Planning Commission is an administrative body consisting of 5 members, including the Mayor; 1 member of the Village Council; and 3 additional persons appointed by the Mayor subject to Village Council confirmation.

Locational criteria were established (Section 802.03) as were "guidelines" which were to be considered by the Village Planning Commission and Village Council in rendering a decision on a "conditional use permit" application (Section 802.04).

B. District Court Proceedings

10280 Northfield Rd., LLC, is the lessee of premises located in the Village of Northfield. Respondent wishes to utilize those premises to engage in a commercial operation which, by definition, would be an "adult bookstore." This location is situated in the B-2 Zoned District but is within 500' of a residence and a residentially zoned district.

On April 18, 1997, 10280 Northfield Rd., LLC, filed its 42 U.S.C. § 1983 and pendent State claim Verified Complaint for Declaratory Judgment, Injunctive Relief, and Preliminary Injunction in the United States District Court, Northern District of Ohio, Eastern Division. There Respondent asserted that Chapter 802 contravened proscriptions placed upon the exercise of Governmental power by the First and Fourteenth Amendments to the United States constitution because it: (A) created an unconstitutional system of prior restraint; and (B) was content-based, not narrowly drawn, and left open inadequate alternative channels of communication. In addition, Respondent asserted that Chapter 802 was void because it was a *de facto* zoning ordinance which was adopted contrary to mandatory State statutory requirements for adoption of zoning ordinances.

On July 3, 1997, the case was tried without a jury before the Honorable David D. Dowd of the Northern District of Ohio, Eastern Division.

On September 26, 1997, the District Court issued its Memorandum Opinion in which, insofar as relevant to this proceeding, it:

> (A) held that Sections 802.04 and 802.05 were constitutionally unenforceable because they created a system of prior restraint lacking sufficiently objective standards; lacking a time limit for the granting/denial of an application for a "conditional use permit"; and having no provision for prompt judicial review of an administrative decision adverse to the applicant;

(District Court Memorandum Opinion, Petitioner's Appendix, pp. 39a- 40a).

> (B) modified Section 802.03 by deleting its reference to Section 802.04 and by judicially inserting the following provision: **"Once an applicant proves that it meets the four locational requirements set forth above, the Planning Commission shall issue a conditional use permit forthwith, promptly, or within a reasonable amount of time"**; and

(District Court Memorandum Opinion, Petitioner's Appendix, p 41a).

(C) held that Sections 802.04 and 802.05 could be severed from the balance of Chapter 802 and that "Sections 802.01, 802.02, 802.03 (this latter as modified by the discussion above), and 802.99 withstand constitutional scrutiny under the First Amendment."

(District Court Memorandum Opinion, Petitioner's Appendix, P. 42a).

A final Judgment consistent with that Memorandum Opinion was entered on September 26, 1997 with that Judgment providing "that Sections 802.02, 802.03, 802.03 (as modified by the Opinion) and 802.09" were constitutionally enforceable (District Court Judgment, Respondent's Appendix, p. 1a).[3]

C. Court of Appeals Proceedings

On October 7, 1997, 10280 Northfield Rd., LLC, filed a timely Notice of Appeal to the Sixth Circuit Court of Appeals. The Village of Northfield did not appeal from any aspect of the District Court Judgment.

On March 4, 1999, the Sixth Circuit issued its Opinion and Judgment in which it:

(A) "reject[ed] the District Court's attempt to salvage the ordinance because the district

3. The District Court also held that Chapter 802 was not content-based, left open adequate alternative channels of communication, and was adopted in conformity with State-mandated procedures. These components of the District Court decision were appealed by Respondent, with the Sixth Circuit finding it unnecessary to decide these issues.

> Court impermissibly rewrote the Village's ordinance;" and,

(Court of Appeals Opinion, Petitioner's Appendix, p. 10a).

> (B) held that, even after "the District Court's reworking of the ordinance," the ordinance remained an unconstitutional system of prior restraint; and,

(Court of Appeals Opinion, Petitioner's Appendix, p. 10a).

> (C) held that "the unconstitutional aspects of the licensing provisions cannot be severed from the rest of the ordinance."

(Court of Appeals Opinion, Petitioner's Appendix, pp. 10a-11a).

For these reasons, the Court of Appeals reversed the Judgment of the District Court and remanded the case "to the District Court for entry of a permanent injunction barring the enforcement of the ordinance against the plaintiff." (Court of Appeals Opinion, Petitioner's Appendix, p. 12a).[4]

On March 18, 1999, the Village of Northfield filed its Petition for Rehearing and Suggestion for Rehearing En Banc, with an Order denying that Petition being entered on May 5, 1999.

On May 13, 1999, the Village filed a Motion to Stay the Mandate pending the filing of a Petition for Writ of Certiorari.

---

4. The Sixth Circuit did not address the remaining issues raised on appeal.

On May 17, 1999, the Court of Appeals issued an Order staying issuance of the mandate.

REASONS FOR DENYING THE WRIT

There are three distinct reasons why this Court should deny review on Certiorari.

First, the Sixth Circuit holding relative severance was based upon a properly stated and applied rule of law. The Petitioner's contrary argument, at best, quarrels with the Sixth Circuit's application of a correctly stated rule of law. Under Supreme Court Rule 10 this argument, even if accurate, which it is not, provides only the most tenuous basis for granting certiorari, with Rule 10 providing, in relevant part, as follows:

> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Second, the Sixth Circuit holding that a Federal District Court lacks authority to rewrite a State municipal ordinance is solidly rooted in settled law and does not merit review.

Third, the Sixth Circuit holding that, even after being redrafted by the District Court, the ordinance remained an unconstitutional system of prior restraint is not only a correct application of established of law but is also unchallenged by Petitioner.

The Sixth Circuit Opinion decides neither a previously undecided Federal question nor conflicts with relevant

decisions of this Court, other Circuit Courts, or a State Court of last resort. Instead, the Sixth Circuit decision properly states and applies established rules of law, with review of that decision being unwarranted.

I.

THE SIXTH CIRCUIT CORRECTLY STATED AND APPLIED ESTABLISHED PRINCIPLES OF LAW IN HOLDING THAT THE CONSTITUTIONAL PROVISIONS OF THE ORDINANCE COULD NOT BE SEVERED FROM ITS UNCONSTITUTIONAL PROVISIONS.

The issue of the severability is primarily a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). The Ohio test for severability is:

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only? *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513; 644 N.E.2d 369, 377 (1994) [*citation omitted*].

These were precisely the rules of law utilized by the Sixth Circuit in analyzing the severability issue in this case. (Court of Appeals Opinion, Petitioner's Appendix, p. 11a).

Petitioner challenges only the Sixth Circuit's application of these settled rules of law.

The reality of this case is, however, that Section 802.03 fails every component of the State-based severability test.

Textually, Section 802.03 incorporates by reference a provision declared unconstitutional by the District Court, providing that an "adult entertainment business" cannot be operated "unless authorized by the issuance of an adult entertainment conditional use permit issued in accordance with Section 802.04." This textual reference to the unconstitutional provisions of Section 802.04 is a strong indication that the legislative body intended the Ordinance to operate as a coordinated, inseparable whole. And, the conclusion that the legislature intended Chapter 802 to both textually and functionally operate as an integrated whole is supported by Section 202.07(a)(2) of the Northfield Codified Ordinances which provides that, in judicially determining legislative intent, it must be presumed that "[t]he entire ordinance is intended to be effective."

Thus, on a textual level, Section 802.03 was, on its face, intended to operate only in conjunction with the unconstitutional restrictions of Section 802.04. And, only with those unconstitutional restrictions did the ordinance receive legislative sanction.

Functionally, section 802.03 cannot operate once Section 802.05 is severed. For it is Section 802.05 which identified the agency authorized to issue a conditional use permit — the Village Council, upon receipt of a Planning Commission report and recommendation. Once Section 802.05 is severed from the ordinance there remains no clue as to whom within

the Village of Northfield would be authorized to accept, let alone approve/deny, an application for a conditional use permit. The severance of Section 802.05 thus renders administration of Section 802.03 virtually impossible.

Furthermore, Section 802.03 cannot constitutionally stand alone because it suffers from the same prior restraint defects found by the District Court to mandate invalidation of Section 802.05 — an absence of a time limit within which a conditional use permit must be administratively approved/ denied and an absence of assurances of prompt judicial review.

Whether analyzed on a textual level or on a functional level, it is clear that chapter 802 was adopted as a single licensing scheme, with all of its sections being interwoven and interdependent upon each other. Given this interconnection and dependence, and as a matter of State law, the licensing scheme must be accepted or rejected as a whole, with the invalidity of one provision vitiating the entire Ordinance. *See State v. Pugh*, 43 O.S. 98; 1 N.E. 439, 454 (1885); *State v. Kassay*, 126 O.S. 177; 184 N.E. 521, 523 (1932).

Remedially, once Sections 802.04 and 802.05 are removed from Chapter 802, it is neither textually nor functionally possible to hold effective the balance of Chapter 802. "The radical dissection necessary for this would leave [Chapter 802] with little resemblance to that intended by the [Northfield] Legislature." *Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 764 (1986). And, the removal of Sections 802.04 and 802.05 would leave intact a licensing scheme which was not only facially incapable of operation because there would be no

agency authorized or empowered to grant/deny a conditional use permit, but one which also suffered from the identical prior restraint defects that caused the District Court to hold Section 802.05 an unconstitutional prior restraint system, a holding not appealed by the Village of Northfield.

The Sixth Circuit holding that "the unconstitutional aspects of the licensing provisions cannot be severed from the rest of the ordinance" (Court of Appeals Opinion, p. 5), is supported, if not mandated, by this record. For this reason alone, the Petition should be denied.

II.

THE SIXTH CIRCUIT HOLDING THAT THE DISTRICT COURT LACKED POWER TO REDRAFT THE ORDINANCE DOES NOT MERIT REVIEW.

The problem created by severing the balance of Chapter 802 from its unconstitutional portions is straightforward — it would leave Section 802.03 to stand, which is the very Section mandating a conditional use permit. It would neither establish a mechanism for obtaining a conditional use permit, nor establish a time limit for the processing of an application for a conditional use permit.

The District Court recognized this problem, striving to resurrect Section 802.03 by not only deleting words from its text, but also by adding the following words to Section 802.03: "Once an applicant proves that it meets the four locational requirements set forth above, the Planning Commission shall issue a conditional use permit forthwith, promptly, or within a reasonable amount of time" (District

Court Memorandum Opinion, Petitioner's Appendix, p. 41a).[5]

The District Court, thus, judicially reallocated authority to grant/deny a Conditional Use Permit from the Village Council to the Planning Commission and simultaneously imported time limitations into the ordinance.

Indeed, Petitioner recognizes that it is only the District Court's judicial legislation which establishes the Planning Commission as the agency empowered to grant/deny a conditional use permit application and that it is only the District Court's judicial legislation which imposes any time limit upon making an administrative decision relative a conditional use permit decision.

Petitioner characterizes this judicial rewriting of its municipal ordinance as permissible because it was only "slight" (Petition, p. 16).

What Petitioner ignores, however, is the fundamental principle that "federal 'courts do not rewrite statutes to create constitutionality.' " *Triplett Grille, Inc. v. City of Akron*, 40 F3d 129, 136 (6th Cir. 1994) (citation omitted). " 'The principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance,' " *Eubanks v. Wilkinson*, 937 F2d 1118, 1125 (6th Cir. 1991) (citation omitted). And, the presence of a severability clause does not allow "the court to dissect an unconstitutional measure and reframe a valid one out of it

5. Again, Petitioner's version of the "words . . . inserted by the District Court" (Petition, p. 5, n.2), appears at p. 6 of the Petition, and is at variance with Respondent's version of the judicial amendment to Section 802.03.

by inserting limitations it does not contain. This is legislative work beyond the power and function of the court." *Hill v. Wallace*, 259 U.S. 44, 70 (1922), quoting *United States v. Reese*, 92 U.S. 214, 221 (1875). *See also Freedman v. Maryland*, 380 U.S. 51, 59 (1965) ("How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide."); *Blount v. Rizzi*, 400 U.S. 410, 429 (1971) (declining to judicially supply time limitations and administrative mechanisms for implementation of Federal statutory schemes; "it is for Congress, not this Court, to rewrite the statute"); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369-370 (1971) ("we lack jurisdiction to authoritatively construe state legislation").

Petitioner points to no authority for its novel proposition that the District Court possessed authority to "slight[ly]," amend a municipal ordinance by writing words into the text of that ordinance (Petition, p. 16). Neither does Petitioner persuasively explain how the omission from a municipal ordinance of a Constitutionally-mandated requirement of a specific time limitation for the administrative granting/denial of permission to speak, *Freedman v. Maryland*, 380 U.S. at 57-58; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-227 (1990), becomes a "slight" oversight which is correctable by Federal judicial legislation. Nor does Petitioner even attempt to explain its theory that it is only a "slight" exercise of Federal judicial power to write words into a municipal ordinance which designate the administrative agency empowered to grant/deny an application for a municipal conditional use permit.

That "[t]his is legislative work beyond the power and function of the court," *Hill v. Wallace*, 259 U.S. at 70, is an

established principle of law which the Sixth Circuit correctly applied when it rejected "the District Court's attempt to salvage the ordinance because the District Court impermissibly rewrote the Village's ordinance." (Court of Appeals Opinion, Petitioner's Appendix, p. 10a).

The Sixth Circuit's holding is solidly rooted in settled law and does not merit review.

III.

THE SIXTH CIRCUIT HOLDING THAT THE ORDINANCE, EVEN AS JUDICIALLY REDRAFTED, WOULD REMAIN AN UNCONSTITUTIONAL SYSTEM OF PRIOR RESTRAINT HAS NOT BEEN CHALLENGED BY PETITIONER, AND RENDERS THE PETITION MERITLESS.

The District Court ruled that "the ordinance lacks the requisite procedural safeguards" to validate a prior restraint system because it contained no time limitations for administrative action and because it contained "no provision for prompt judicial review of an adverse [administrative] decision" (District Court Memorandum Opinion, Petitioner's Appendix, pp. 39a, 40a). The Sixth Circuit correctly observed that Petitioner "did not appeal from [this] holding" (Court of Appeals Opinion, Petitioner's Appendix, p. 9a).

The issue as to whether the judicially-modified ordinance remained an unconstitutional system of prior restraint was raised and placed squarely before the Sixth Circuit by Respondent. In addressing this issue, the Sixth Circuit held that the "District Court's reworking of the ordinance fails to provide the required '*specified* and reasonable time period'

during which the licensor must make a decision on an application for a Conditional Use Permit" (Court of Appeals Opinion, Petitioner's Appendix, p. 10a). *See FW/PBS, Inc.*, 493 U.S. at 228. Underlying this holding was a record which indicated that all decisions of the Planning Commission, the agency designated by the District Court to make a conditional use permit decision, were reviewable by the Village Council which has authority to "confirm, amend, or reverse the decision" (Northfield Codified Ordinances Section 1220.05).

Thus, even if the District Court's decision calling for the Planning Commission decision to be made "promptly, forthwith, within a reasonable amount of time" (District Court Memorandum Opinion, Petitioner's Appendix, p. 41a). was constitutionally tolerable, that decision would still be subject to review by the Village Council. And, there are absolutely no explicit provisions in the Northfield Codified Ordinances calling for the Village Council to make a conditional use permit decision "within a *specified* brief period," *Freedman*, 380 U.S. 58-59.

In addition, the judicial reworking of the ordinance effected by the District Court also fails to remedy the ordinance's fatally defective omission of a "provision for prompt judicial review of a decision adverse to a Permit applicant" (Court of Appeals Opinion, Petitioner's Appendix p. 10a). *See FW/PBS*, 493 U.S. at 228.

The Petition for Writ of Certiorari does not challenge this holding. Petitioner is, moreover, bound by this holding because under Supreme Court Rule 14, 1(a) "[o]nly the question set out in the petition, or fairly included therein, will be considered by the Court."

Thus, given this Sixth Circuit holding, even if Section 802.03 were severable and even if the District Court's amendments to that Section were deemed appropriate, Section 802.03 would still suffer from virtually every defect of an unconstitutional prior restraint system. This reduces Petitioner's severability argument to an academic exercise because, even if Petitioner were to here prevail, the consequence would be that its ordinance would remain a void and unenforceable system of prior restraint.

For this reason alone, the Petition should be denied.

CONCLUSION

The well-reasoned Sixth Circuit decision is firmly rooted in and correctly applies established law, conflicts with no decision of this Court or any other court, and raises no important question of Federal law which has not been decided by this Court. In addition, a dispositive aspect of the Sixth Circuit decision has not been challenged by Petitioner.

For these reasons, Respondent requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

GREGORY FISHER LORD
Counsel of Record
GREGORY FISHER LORD, P.C.
Attorneys for Respondent
12900 Hall Road
Suite 470
Sterling Heights, MI 48313-1152
(810) 997-4900